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February 3, 2011

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****EMPLOYMENT LAW ALERT****

Department of Labor Issues Request for Information

By: S. Whitney Rahman

On December 21, 2010, the Department of Labor issued a Request for Information concerning reasonable break time for nursing mothers. As part of the Patient Protection and Affordability Care Act (“PPACA”), the Fair Labor Standards Act (“FLSA”) was revised to require employers to provide “reasonable break time for an employee to express breast milk for her nursing child for one 1 year after the child’s birth each time such employee has need to express the milk.” Employers must provide a private area, which is not a restroom, for this purpose. 29 U.S.C. § 207(r). We previously sent an Employment Law Update on this issue on May 17, 2010.

The Department currently does not plan to issue regulations on the law, but has asked for employer input as to practical issues surrounding the law. The Request for Information also contains the Department’s preliminary interpretations of the law’s requirements.

Some of the areas covered by the Request for Information are:

1. **Unpaid Leave**. The law indicates that breaks for nursing mothers do not need to be paid. The Department takes the position that, if the employer provides breaks of less than 20 minutes, which must be paid under the FLSA, an employee who uses this break time to express breast milk must be paid for the time. Any additional time used could be unpaid, as long as the employee is completely relieved from duty. While not required, the Department encourages flexible scheduling to allow a nursing mother to make up unpaid break time.

2. **“Reasonable” Break Time**. The Department wants employers to consider the frequency of breaks needed, as well as the length of time to express breast milk. The Department notes that new mothers will need to express milk more often, and contemplates that nursing mothers typically will need two to three breaks to express breast milk during an 8 hour shift.

The length of time needed will vary from person to person, typically taking 15 to 20 minutes. Length of time to get to the space allowed for expressing breast milk also should be considered, as well as other practical matters, such as whether there is a refrigerator and area to wash nearby.

3. **Space to Express Breast Milk**. Under the law, employers must provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.” 29 U.S.C. § 207(r)(1)(B). Currently, the Department of Labor’s interpretation is that this requires, where practicable, a separate room (that could be partitioned off for multiple nursing mothers). Where a separate room is not practicable, an employer may create a space with partitions or curtains.

Neither space needs to be permanently dedicated to nursing mothers, although some employers may choose to do so. The space must contain a place for the nursing mother to sit, and a flat space other than the floor for the breast pump. Ideally, the space will have access to electricity. A sink and refrigerator, while not required, may be helpful to have in the room. The Department interprets break time to include the time to store the milk safely.

Recognizing that many work sites may not lend themselves well to creation of a separate room for nursing mothers, the Department is soliciting comments on the conditions under which spaces like storage spaces, utility closets and the like could be considered adequate spaces. The Department also wants comments on how to provide adequate space for nursing employees who do not work in a fixed place, such as bus drivers, mail carriers, police and emergency personnel.

4. **Notice.** The Department encourages nursing mothers to give employers advance notice of the intent to take breaks at work to express breast milk. The Department seeks comments regarding how to address notice issues.

5. **Undue Hardship.** The statute contains a limited undue hardship exception for small employers. The Department intends to use Fair Labor Standards Act definitions to determine potentially qualifying employers. The employer bears the burden of providing an undue hardship, which the Department believes will be able to be shown only in rare cases.

6. **Enforcement.** The law will be enforced and investigated by the Department's Wage and Hour Division. The Department plans to give priority consideration to complaints under the law to allow expeditious resolution of claims. If an employer does not comply with the law, the Department may bring a claim for injunction, reinstatement and lost wages.

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If you wish to make comments, information is available at <http://www.regulations.gov> and at <http://www.dol.gov/whd/nursingmothers>. Comments must be received by February 22, 2010. If you want further information about this law or have any other labor or employment law issues, contact S. Whitney Rahman or John W. Roland at 610-372-5588.